FILE COPY

Office - Supreme Court, U.
FILED
JUN 1 1936
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 656

UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

J. M. CORRICK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

PETITION FOR REHEARING.

GEO. I. HAIGHT,
Counsel for Petitioners.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 656.

UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

J. M. CORRICK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now come the Appellees, and present this, their petition for a rehearing of the above entitled cause and, in support thereof, respectfully show:

This case was decided May 18, 1936. It involves an interlocutory injunction granted by the specially constituted District Court against the Secretary of Agriculture and others upon the bill of complaint of certain market agencies at the Union Stock Yards in Chicago, Illinois.

A rehearing of the case is respectfully requested for the following reasons:

I. The Court, in its opinion, states that the District Court was without jurisdiction, assigning two grounds. The

first is that the case is not one "brought to enjoin, set aside, annul or suspend; in whole or in part, any order of the Interstate Commerce Commission". The case of *Acker, et al.* v. *United States of America, et al.*, No. 655, decided on even date, was one brought to enjoin, set aside, annul and suspend the rate orders of the Secretary of Agriculture made upon January 8, 1934, and March 12, 1934, and to make effective the rate which preceded it. The instant case was brought to enjoin, set aside, annul and suspend the same rate orders, and to make effective a rate established by the market agencies in accordance with procedure provided by the Packers and Stockyards Act. In the former, the District Court's jurisdiction is unchallenged. In both cases the attack is upon the same orders. Neither one is an attack upon a negative order. The bill of complaint in the instant case sets up the orders of January 8, 1934, and of March 12, 1934. Of course, the Secretary's refusal to act is not an order. The prayer is broad. Its narrower parts cannot destroy the effect of the prayer for general relief. The prayer to enjoin the Secretary and others from proceeding under the Secretary's orders of January 8, 1934, and March 12, 1934, is apposite to the allegations of the bill of complaint respecting said orders. That the relief would confirm the effectiveness of the rate schedule posted by Appellees on October 19, 1934, no more argues that the instant case was not one to enjoin, set aside, annul or suspend the Secretary's orders of January 8, 1934, and March 12, 1934, than would the fact that an earlier rate order would have been made effective in the Acker case had the Secretary's orders of January 8, 1934, and March 12, 1934, been enjoined, set aside, annulled or suspended in the said *Acker* case.

II. The second ground for lack of jurisdiction, as stated in the opinion, is found in the interpretation placed upon certain sections of the Packers and Stockyards Act. Of

course, as the opinion in its latter part points out, a rate ordered by the Secretary may be enjoined in any appropriate judicial proceeding, or may be altered by subsequent order of the Secretary. This court has frequently pointed out that a rate order valid at one time and not confiscatory, may at a later time, under different facts, become invalid and confiscatory. When such situation arises, at least two different remedies may be pursued. One may be through inducing action on the part of the Secretary, or the Secretary may act on his own initiative. Another is a proper judicial proceeding to enjoin the rate which has become invalid or confiscatory. Where the Secretary has fixed a rate, the rate, as the statute provides, is to be thereafter observed. The order as to what regulation or practice is or will be just, reasonable and non-discriminatory, is to be thereafter followed. The "thereafter" in neither of the foregoing phrases cannot mean forever, if the Secretary does not act. It plainly means until the Secretary acts, or some proper proceeding is taken to effect a change. We take it that the opinion in stating—

> "But when the Secretary, pursuant to Section 310, orders specified rates thereafter to be charged, these become the only lawful rates and so remain until the further order of the Secretary"

suggests no impingement on the power of a proper court at a later time, under proper facts, to enjoin rates once valid if they become invalid or confiscatory.

Congress, in the enactment of the Packers and Stockyards Act, did nothing to limit this power of courts. On the contrary, it is specifically recognized in Section 314. Packers and Stockyards Act provided another method for changing rates to meet changing circumstances. It specifically placed a power in the market agencies so to do, and set up the machinery therefor, with a veto power in the Secretary to be exercised after hearing. If this be not so, then many of the provisions of the Act relating to the filing of

rate schedules can be effective only once and then, after the Secretary has entered a rate order, are without vitality forever. For instance, Section 306 provides for the filing of schedules by a market agency within sixty days after the Secretary has given public notice that a stockyard is within the definition of Section 302. May the market agencies in a business, subject to quick and wide variations, never act again in an endeavor to raise rates save through inducing action on the part of the Secretary, which may be difficult—or by negative action in a court?

Paragraph (c) of Section 306 indicates that changes initiated by the market agencies from time to time are contemplated in saying—

> "No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary."

That changes by the market agencies were contemplated is further shown in the requirement in the same paragraph that the notice to the Secretary

> "shall plainly state the changes proposed to be made and the time such changes will go into effect."

It provides that these changes so initiated by a market agency may by the Secretary, for good cause shown, be made on less than ten days' notice, and that the Secretary may modify the requirements of Section 306 in regard to publishing, posting and the filing of the schedules.

Paragraph (d), relating to these schedules, gives one cause for which the Secretary may refuse to receive them. That is, that they do not provide for and give lawful notice of the effective date.

That it is contemplated that market agencies may file schedules with veto power in the Secretary is also shown by paragraph (e), in the language

> "*Whenever* there is filed with the Secretary any schedule stating a *new rate or charge*; or a *new regulation or practice* affecting any rate or charge, the Secre-

> tary may, either upon complaint or upon his own initiative without complaint, at once, and if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing * * *."

Then follow the provisions limiting the suspension to thirty days, and if at the end of sixty days the full hearing provided for is not completed, and veto action is not taken, the proposed change of rate, charge, regulation or practice shall go into effect. The Secretary's refusal to act in the instant case brought the result which the statute contemplated. It, of course, does not limit the Secretary's power to take action at any time after hearing instituted on his own motion.

In Section 309 provisions are made for the disposition of complaints made by any person respecting violations of provisions of Sections 305, 306, 307 and 308, or of any order of the Secretary made under Sections 301 to 317. Among these is Section 306, which imposes the common law duty upon the market agencies to make just, reasonable and non-discriminatory charges. It can be said, in pursuance of the philosophy of the Arizona Grocery case, that no charges can be held discriminatory, unjust or unreasonable if they are downward revisions of a Secretary's order. The point is, however, that this Section also contemplates that schedules may be established without that protection.

In Section 310, paragraph (a), the provision that the Secretary

> "May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case * * *",

and the provisions of paragraph (b) following, are not indicated in any part of the Act to give such orders perpetuity at the Secretary's will. Had it been intended to make nugatory other provisions of Section 306, after the initial action of the market agency on proposing schedules of rates

at a stockyards inception, Congress would have said so. Indeed, if any construction be given Section 306 other than the foregoing, then following the Secretary's entry of the order as to rates at the Chicago Union Stockyards made after the arbitration of 1923, as set forth in the bill of complaint (Rec. p. 4), all of its provisions have since been without vitality.

The provision of paragraph (c) of Section 309, to the effect that the Secretary may institute an inquiry on his own motion in any case, and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, includes Section 306 by its recital that it relates to

"any provisions of this title."

Thus, both by specific language in the Act and by matters implicit therein, it seems clear that the procedure for changing a rate which may be initiated by the market agencies themselves was not limited to one initial act upon the genesis of a stockyards, nor was the Secretary's power to initiate, or any court's power to negative, made exclusive.

We are aware of nothing in the foregoing views that is contrary to the holdings of *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co., et al.*, 284 U. S. 370. That case held that the Interstate Commerce Commission may not, through repeal of a rate order, make its effect retroactive. It did not hold that the public utility may not initiate rates or that the exclusive power to undertake changes is resident in the Commission, with a negative power in the Courts.

In the instant case, petition to remedy an intolerable condition was made to the Secretary. The new schedule presented to him for filing was itself a further petition. Also it was a means provided by the Packers and Stockyards Act to secure a hearing. The statute placed a duty

on the Secretary to act or to permit the schedule to stand through refraining from action. The procedure followed was an authorized one, and by analogy in nowise inconsistent with that authorized and followed under the Interstate Commerce Act. The Secretary stood upon his previous orders and threatened to enforce them. The suit attacked those orders and showed that they had been superseded in accordance with the procedure provided by the Packers and Stockyards Act.

For the reasons stated, it is requested that a rehearing be granted.

Respectfully submitted,

GEORGE I. HAIGHT,
Counsel for Petitioners.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

GEORGE I. HAIGHT.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 656.—October Term, 1935.

United States of America, et al., Appellants, *vs.* J. M. Corrick, et al.	Appeal from the District Court of the United States for the Northern District of Illinois.

[May 18, 1936.]

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from a decree of a specially constituted district court awarding an interlocutory injunction against the Secretary of Agriculture and others restraining them from prosecuting the appellees, operators of market agencies at the Chicago stockyards, for violation of the Packers and Stockyards Act, 1921.[1]

The appellees are, for the most part, the same persons and corporations as the appellants in No. 655 (*ante* p.). While that case was pending on appeal to this court, and the rates therein prescribed by order of the Secretary of Agriculture were suspended until final determination respecting their validity, the appellees prepared and posted, on October 19, 1935, a schedule of rates for market services at the Chicago stockyards to become effective November 1, 1935. These rates were, in most instances, higher than those prescribed by the Secretary's orders of January 8 and March 12, 1934. On the same day the appellees tendered the schedule to the Secretary for filing. He declined to receive it, assigning as reasons for his refusal that once rates are fixed by him no change therein may be made except by his order or by action of a court of competent jurisdiction and that litigation was then pending challenging the validity of his outstanding orders. Thereupon the appellees filed their bill in the district court reciting the course of the Secretary's proceedings referred to in No. 655, the orders made, and the suit to restrain their enforcement. The pleading asserts that the orders were based on data for the years 1931 and 1932; that, subsequent to promulgation of the orders, conditions had so changed that to prevent destruction of their business the appellees were compelled to adopt a new schedule of charges; it recites the

[1] 42 Stat. 159; U. S. C. Tit. 7, Chap. 9.

Secretary's refusal to file the new schedule and alleges that the refusal was a violation of his duty under the act; it charges that his refusal was of no effect since his only power in the premises was to file the schedule and, if he believed the rates named therein unjust, unreasonable, or discriminatory, to suspend them, pursuant to the provisions of the act, and, after hearing, fix reasonable and nondiscriminatory rates. The bill alleges that the schedule of October 19, 1935, became effective November 1, 1935, and that if appellees failed to conform thereto they would incur heavy penalties while, on the other hand, the Secretary was threatening to prosecute them unless they adhered to the rates prescribed by his orders of January 8 and March 12, 1934. After a hearing upon the bill and a supporting affidavit the court granted an injunction.

On appeal from the granting or refusal of an interlocutory injunction our inquiry is limited to the question whether the court abused its discretion.[2] The appellants urge that the action taken constituted such an abuse for the reason that want of jurisdiction is evident upon the face of the bill. With this contention we agree.

Section 316 of the Packers and Stockyards Act[3] adopts the same procedure for restraining enforcement of or setting aside orders of the Secretary as is provided by law with respect to orders of the Interstate Commerce Commission. By Section 1 of the Commerce Court Act[4] jurisdiction was conferred upon the Commerce Court "over all cases . . . brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiencies Act of October 22, 1913,[5] transferred the jurisdiction of the Commerce Court to the district courts and provided that such cases should be heard by three judges. The words of the statute exclude a mere refusal to act from the section conferring jurisdiction, and this court has accordingly held that an order negative in form and substance is not within the relief ac-

[2] *Farrington* v. *Tokushige*, 273 U. S. 284, 290; *United Gas Co.* v. *Pub. Serv. Com.*, 278 U. S. 322, 326; *Alabama* v. *United States*, 279 U. S. 229, 230; *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 338.

[3] 42 Stat. 168. U. S. C. Tit. 7, Sec. 217: " . . . the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title."

[4] c. 309, 36 Stat. 539.

[5] c. 32, 38 Stat. 208, 219; U. S. C., Tit. 28, §§ 41 (8) 27 (28), 47.

corded.[6] It is clear that the instant bill was not one to set aside or suspend any order of the Secretary. The proceeding brought for that purpose was No. 655, just decided. This suit is to restrain the Secretary and others from instituting prosecution for violations of an order. Its ultimate purpose is to secure a decree affirming the validity and effectiveness of the rate schedule posted by the appellees October 19, 1934. The injunction restrains the defendants from preventing, or attempting to prevent, or from interfering with the appellees in the collection of the rates of charge fixed by the schedule tendered to the Secretary October 19, 1935.

The district court was without jurisdiction for a further reason. Section 306 of the Packers and Stockyards Act[7] directs that within sixty days after the Secretary shall have given notice that a stockyard falls within the definition of Section 302 every market agency at such stockyard shall file with him, and keep open for inspection, schedules of rates and charges for its services. No changes are to be made in the rates so filed and published except after ten days' notice to the Secretary and to the public. Section 310 authorizes an order for investigation and a hearing by the Secretary on complaint, or on his own initiative, as to whether existing rates are unjust, unreasonable, or discriminatory, and empowers him, after such hearing, to "determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, *to be thereafter observed* in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory *to be thereafter followed;* . . . ".[8] Section 306 prescribes the method of initiating rates upon the act's becoming effective, and of voluntary alteration of them from time time. But when the Secretary, pursuant to Section 310, orders specified rates thereafter to be charged these become the only lawful rates and so remain until the further order of the Secretary.[9]

The bill shows that the Secretary, after inquiry and full hearing, fixed rates thereafter to be charged by the appellees, and these had not been set aside or enjoined in any appropriate judicial proceed-

[6] *Procter & Gamble* v. *United States*, 225 U. S. 282, 292; *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412; *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82; *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522; *Standard Oil Co.* v. *United States*, 283 U. S. 235, 238.

[7] c. 64, 42 Stat. 164. U. S. C. Tit. 7, Sec. 207.

[8] c. 64, 42 Stat. 166. U. S. C. Tit. 7, Sec. 211.

[9] Compare *Arizona Grocery Co.* v. *Atchison, T. & S. Ry. Co.*, 284 U. S. 370, 386, 387.

ing or been altered by subsequent order of the Secretary. The court was, therefore, without power to enjoin the prosecution of the appellees for charging rates other than those established by the Secretary.

The appellants did not raise the question of jurisdiction at the hearing below. But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, and the district court should, therefore, have declined *sua sponte*, to proceed in the cause.[10] And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it.[11] While the District Court lacked jurisdiction we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.[12] The decree must, therefore, be reversed and the cause remanded with directions to dismiss the bill.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

---

[10] See *Cutler* v. *Rae*, 7 How. 729, 731; *Morris* v. *Gilmer*, 129 U. S. 315, 325; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62; *Mattingly* v. *Northwestern V. R. R. Co.*, 158 U. S. 53; *443 Cans* v. *United States*, 226 U. S. 172; *Mitchell* v. *Maurer*, 293 U. S. 237, 244.

[11] *Perez* v. *Fernandez*, 202 U. S. 80, 100; *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 13.

[12] *United States* v. *Huckabee*, 16 Wall. 414, 435; *Stickney* v. *Wilt*, 23 Wall. 150, 163; *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16, 19.